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In the Supreme Court of the United States

OCTOBER TERM, 1973

SIMON GORDEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Simon Gorden, prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit entered in this case.

Opinion Below

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming petitioner's conviction, is printed in the Appendix (App. 1) to this petition.

Jurisdiction

The judgment of the Court of Appeals for the Seventh Circuit was entered on April 17, 1974. A timely petition for rehearing was denied on May 8, 1974. This petition is filed within 30 days of that date as required by Supreme Court Rule 22(2). This Court has jurisdiction under 62 Stat. 928, 28 U.S.C. Sec. 1254(1).

Question Presented

Where petitioner timely moved for disclosure of the presentence investigation report, the court denied such request pursuant to its "blanket" policy of non-disclosure without exercising discretion in petitioner's case as required by Federal Rule of Criminal Procedure 32(c)(2), and petitioner therefore could not confront, refute or explain detrimental material contained in the report which was relied upon by the court and where the court sentenced petitioner, who had no previous criminal record, to the maximum possible term of imprisonment, did the court so abuse its discretion by refusing to exercise its discretion in ruling on the motion for disclosure that petitioner's sentence must be vacated?

Rule of Criminal Procedure Involved

Rule 32(c) of the Federal Rules of Criminal Procedure provides:

Rule 32. Sentence and Judgment

(c) Presentence Investigation

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise di-

rects. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. *The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon.* Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government. (Emphasis added)

Statement of the Case

This petition seeks review of the judgment of the United States Court of Appeals for the Seventh Circuit affirming petitioner's conviction.

Summary

Petitioner, an asphalt paving contractor since 1958 (Vol. 6, pp. 32-33) [1] pleaded guilty to an information (No. S-CR-72-75) charging that he, as an employer of labor, failed to collect, account for, and pay over to the United States the Federal Insurance Constribution taxes and federal income taxes withheld from wages during the period April 1, 1972

[1] A. refers to Appellant's Appendix filed in the Court of Appeals, and R. to the Record on Appeal in that court. The Transcript of Proceedings consists of eight volumes, individually paginated; they will be cited by volume and page.

to June 30, 1972, after having received notice that such taxes must be deposited within two banking days after collection, in violation of 26 U.S.C. 7205. (A. 1-2, R. 1-2). The court ordered a pre-sentence investigation at petitioner's request (Vol. 5, p. 10), and denied petitioner's motion to produce the report, both initially (Vol. 6, p. 3) and after it developed that the report contained damaging information relied on by the court, the nature and substance of which the court persisted in refusing to reveal. (Vol. 6, pp. 44-45) After hearing in aggravation and mitigation, (Vol. 6) the court sentenced petitioner to one year imprisonment. (Vol. 6, p. 45). The court persisted in said sentence following hearing additional testimony and argument. (Vol. 8)

Facts

Petitioner moved for a presentence investigation and for probation. (Vol. 5, p. 10)

The government indicated its opposition to petitioner's motion for probation. (Vol. 5, p. 11)

Thereafter, on May 18, 1973, the court denied petitioner's motion for disclosure of the presentence investigation report. (A. 2; Vol. 6, p. 3)

A number of witnesses testified on petitioner's behalf at the hearing in aggravation and mitigation, including two businessmen with whom petitioner has had business dealings, who testified that he faithfully performs his obligations to the best of his ability; they recommended granting him probation (testimony of Alex McPherson, Vice President of Illinois National Bank (Vol. 6, pp. 3-9); testimony of Matthew Hitzemann, now Administrative Assistant to the Mayor of Springfield, who previously dealt with petitioner in connection with financial transactions concerning

the witness' previous employment as a credit officer for the Illinois National Bank, (Vol. 6, pp. 9-12)); petitioner's wife, who testified that he was a good husband and a good provider—moreover, title to the family home was in another's name due to financial problems, and putting petitioner in jail most probably would mean that the family would have to go on welfare and lose the home. (Vol. 6, pp. 12-17) She testified that she and petitioner have three children of their own and an adopted child. (Vol. 6, p. 13) While Mrs. Gorden works, she takes home only $143 every two weeks. (Vol. 6, p. 15) Two of petitioner's employees testified to his good treatment of his employees, trustworthiness, integrity, and worthiness for probation. (Vol. 6, pp. 17-27)

Testifying on his own behalf (Vol. 6, pp. 28-39), petitioner stated, among other things, that he failed to make the deposit giving rise to the charge to which he pleaded guilty because: "It was a misunderstanding on my part and also on the part of my bookkeeper." (Vol. 6, p. 28)

> "I assumed that what he [the agent] meant [was] that he wanted me to start the fourth quarter clean, October, November and December. I said is that what you want me to do, start the fourth quarter clean, and they said yes." (Vol. 6, p. 29)
>
> "Q. (by defense attorney Mr. Coleman): And was it your position that you then had Friday and Monday, two working days under the notice within which to make this deposit?
>
> A. (defendant): *That was not my understanding at the time, no sir.*
>
> Q. What was your understanding?
>
> A. *My understanding was that the following week* which would be the first week of work in the fourth quarter, the first week in October *that I was then to*

> *start opening up an account* and make my deposits within two banking days after." (Vol. 6, p. 30) (Emphasis added.) [2]

As to what he would do if granted probation, petitioner thought he could possibly salvage his home, some of his business equipment, and complete some asphalt paving jobs already under contract. "I do not want to take bankruptcy. I want to pay everyone [w]hat they have coming." (Vol. 6, p. 36) Petitioner further stated that he did not read in full the notice given him on Sept. 29 by the agents. (Vol. 6, p. 39) And again: ". . . I still had *no intent* of doing any wrongdoing, and it definitely was a *misunderstanding* . . ." (Vol. 6, p. 43) (Emphasis added.)

The Court stated:

> "I have read this probation report, and this man now, Mr. Coleman, has done a lot more than what he's told you about or what he's told the Court about with Internal Revenue and with withholding and Social Security taxes. I ordinarily don't like to punish a man because he owes some taxes, but this has been a very, very pursued violation of failure to pay withholding taxes, and there's a large indebtedness that he owes to the Government for that very reason.
>
> "Now he pretends to be a good family man. I can't agree [that he is] with what I read in the probation report, and he knows about those things without me reciting them here today." (Vol. 6, pp. 42-43)

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[2] When entering his plea of guilty, petitioner made similar statements concerning his misunderstanding as to the time when deposits must commence. (Vol. 5, pp. 8-9) Petitioner includes such references herein, not to attack the validity of his guilty plea, but in mitigation of punishment, and to demonstrate that the sentencing court relied on unfoundable material in the presentence report.

The court alluded to some allegation of petitioner's unfaithfulness to his wife (Vol. 6, p. 44), and indicated that "There's still things *in addition to that* that this report shows." (Emphasis added.) Defense counsel pointed out that they had had no opportunity to rebut the contents of the probation report. (Vol. 6, p. 44) The court stated: "His probation report is bad." (Vol. 6, p. 45)

> "Mr. Coleman: As I understand the criminal rule of procedure, I—
>
> The Court: *I've refused since I've been a judge to make these reports available.*
>
> Mr. Coleman: And if some person has made a false or malicious statement—
>
> The Court: Well that isn't the question that I'm worried about. *This man knows what he's done in his life as well as I do from this report.*
>
> Mr. Gorden: I don't understand.
>
> The Court: Now, I'm going to deny you probation." (Vol. 6, p. 45) (Emphasis added.)

Petitioner was then sentenced to one year imprisonment (Vol. 6, p. 45), the maximum possible sentence for the offense.

At a subsequent hearing to reconsider sentence, petitioner presented eleven witnesses, in addition to himself and his wife, in mitigation. (Vol. 8, pp. 3-134). The court persisted in the sentence, indicating repeatedly that he believed petitioner violated a trust, which the court considered a very serious offense. (Vol. 8, pp. 143, 151-54) Moreover, while petitioner's plea of guilty was to the offense of failure timely to pay an amount for one week's account of approximately $600 in taxes (Vol. 8, p. 159), the court seemed to believe that petitioner's undisputed indebtedness was in the range of $18,000-$19,000 (Vol. 8, p. 154), this impression having come from the government's questioning of petitioner and other witnesses during the hearing.

Reasons for Granting the Writ

The defense, upon timely request, should have been permitted to see the presentence invstigation report, in order to be in a position factually to refute any statements therein contained and relied on by the court which may not have been based upon relevant and competent information. The District Court flatly refused to consider the request, instead of exercising its discretion in the individual case as required, and such total failure to exercise discretion amounts to flagrant abuse of that discretion conferred by Federal Rule of Criminal Procedure 32(c)(2). Without any basis in the record, the Court of Appeals presumed that petitioner's presentation at the subsequent sentencing hearing was sufficient to rebut any unfavorable material contained in the report; but such presumption does not answer petitioner's substantial claim of prejudice. The instant decision conflicts with holdings of the Second and District of Columbia Circuits.

Petitioner's motion for disclosure of the presentence investigation report (A. 2) was initially denied (Vol. 6, p. 3). Then, during sentencing, when it became obvious that the court was relying on information in the report which was detrimental to petitioner (Vol. 6, p. 42-45), and which petitioner could not refute because of the court's refusal to order disclosure of the report, his renewed requests for disclosure were again denied. (Vol. 6, pp. 44-45)

That the court relied on information in the report cannot reasonably be denied. The court stated:

> "I have read this probation report, and this man [defendant] . . . has done a lot more than what he's told you [defense counsel] about or what he's told the

court about . . . Now, he pretends to be a good family man. I can't agree [that he is] with what I read in the probation report, and he knows about those things without me reciting them here today." (Vol. 6, pp. 42-43) "There's still things in addition to that that this report shows." (Vol. 6, p. 44) "His probation report is bad." (Vol. 6, p. 45)

Disclosure of the contents of a presentence investigation report is within the discretion of the trial court. F.R. Cr.P. Rule 32(c)(2) provides in pertinent part that: "The court before imposing sentence *may disclose* to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon." (Emphasis added.)

While such disclosure admittedly is discretionary rather than as a matter of right, clearly where, as here, the judge is relying on portions of the report unfavorable to petitioner, disclosure becomes necessary to permit defendant to refute any factually incorrect material in the report upon which the court may have relied. *United States* v. *Espinoza*, 481 F.2d 553 (5 Cir. 1973); *Baker* v. *United States*, 388 F.2d 931 (4 Cir. 1968); *United States* v. *Janiec*, 464 F.2d 126 (3 Cir. 1972); *United States* v. *Picard*, 464 F.2d 215 (1 Cir. 1972). Moreover, where, as here, the court evidently relied on the contents of the report, it is no answer for the court to state to petitioner, as the court did here, "[H]e [defendant] knows about those things [contained in the probation report] without me reciting them here today" (Vol. 6, p. 43), or "This man [defendant] knows what he's done in his life as well as I do from this report." (Vol. 6, p. 45) For this line of reasoning presumes that petitioner actually was "guilty" of the unfavorable things

obviously contained in the report. In fact, without perusing the report, it was impossible for the defense even to know what to attempt to refute.

Under these circumstances, it was reversible error for the court to refuse to disclose the presentence investigation report.

This Court has condemned sentencing procedures based upon the trial court's reliance on apparently erroneous factual information, holding that a sentencing procedure which permits this to occur violates fundamentals of due process of law. *Townsend* v. *Burke,* 334 U.S. 736 (1948). See also *United States* v. *Tucker,* 404 U.S. 443 (1972).

> "Implicit in the Court's holding in *Tucker* is the principle that despite the broad discretion left to the trial judge in assessing background information for sentencing purposes . . . a defendant retains the right not to be sentenced on the basis of invalid premises." *United States* v. *Espinoza,* 481 F.2d 553, 555 (5 Cir. 1973).

> "As with disclosure of presentence reports, the district court possesses wide discretion as to determining the feasibility and need for permitting rebuttal of sentencing information . . . But *the existence of discretion presupposes that discretion will in fact be exercised* and will be exercised in a manner consistent with the purposes of informed and appropriate sentencing." *Id.* at 557. (Emphasis added.)

Here, refusal to disclose the presentence report precluded defendant from any effective attempts to rebut any erroneous factual information contained therein.

Moreover, it is clear from the court's own statement of record that he did *not* exercise discretion by so refusing,

but rather, that it was his policy *never* to order disclosure of presentence investigation reports. The court stated: *"I've refused since I've been a judge to make these reports available."* (Vol. 6, p. 45) Refusal in petitioner's case, based upon such blanket policy of non-disclosure regardless of the circumstances of the particular case, constitutes a clear abuse of discretion, for failure to exercise discretion.

On almost identical facts, several courts of appeals have held that such blanket policy of non-disclosure amounts to an abuse of discretion for failure to exercise any discretion in any particular case. In *United States* v. *Brown,* 470 F.2d 285 (2 Cir. 1972), the trial court stated of record, much as did the court in the case at bar (Vol. 6, p. 45), that:

> "It is not the policy of the Court to disclose presentence reports . . . it has never been done in all my time in the courtroom that I can recall." 470 F.2d at 287.

The reviewing court concluded that refusal to order disclosure based upon such policy rather than upon exercise of discretion on a case by case basis amounts to an abuse of discretion, for failure to exercise any discretion at all:

> "[I]t certainly was intended [by Rule 32(c)(2)] that the sentencing court exercise its discretion in each case . . . It is equally clear that when a judge states, as he did here, that in effect his policy is never to disclose presentence reports, that is not an exercise of discretion on an individual basis . . . Discretion under Rule 32(c)(2) must be exercised on a case-by-case basis, not by a blanket policy of non-disclosure. . . .

> In any event, because it is apparent that the district judge never actually exercised his discretion on pre-sentence report disclosure in this case, we remand for reconsideration and resentencing. Since the judge twice ruled upon defendant's sentence and twice used improper sentencing procedures, we think it best that further proceedings be assigned to a different judge." *Id.* at 287-89.

The foregoing quotation could be about the case at bar; it is, instead, from the *Brown* case, *supra*. We consider that case directly in point, and request this Court to adopt its reasoning and dictates.

Reaching the same conclusion, the Court of Appeals for the District of Columbia Circuit set aside defendant's sentences and remanded for resentencing because the district court had denied his request for inspection of the presentence report based upon its uniform policy of non-disclosure. *United States* v. *Bryant*, 442 F.2d 775 (D.C. Cir. 1971). The reviewing court considered the policy factors weighing for and against disclosure, and concluded:

> "We hold that the *discretion* whether—and to what extent—defendant or his counsel is to have access to the presentence report, with accompanying opportunity to comment upon it, *must be exercised in each individual case*. We further think that sound judicial administration requires that the fact that such discretion has been exercised appear on the face of the record. . . .
>
> . . . [T]hough it appears from the transcript that appellant had no prior criminal record, we cannot surmise that nothing in the report, either of a derogatory or a favorable nature, if made known to appellant or his counsel, could not have been commented

> upon in a manner useful to the court. Since this possibility is almost invariably present, there is need for the court at least not to close its mind to the advisability of disclosure." *Id.* at 778. (Emphasis added.)

The court in *Bryant* was following and adopting dicta from *United States* v. *Queen*, 435 F.2d 66 (D.C. Cir. 1970). In *Queen* defendant's conviction was affirmed though the presentence report had been withheld pursuant to a policy of non-disclosure, because there defendant had nonetheless been given an opportunity to explain his previous record. The court's advisory statements in *Queen*, and adopted by the *Bryant* opinion (442 F.2d at 777-78), are as follows:

> "[W]e believe that the discretion called for by Rule 32 is the exercise of discretion in individual cases, not the discretion of the trial judge to adopt a uniform policy of non-disclosure in all cases irrespective of circumstances." 435 F.2d at 67.

The court noted that:

> "[T]he trial judge refused disclosure of the present report pursuant to her general policy of non-disclosure without any reference to the need for disclosure or confidentiality in the circumstances of this particular case." *Id.* at 67 n.2.

As in the case at bar.

And while the Fourth Circuit has not expressly reversed for such refusal to exercise discretion, as have the Second and District of Columbia Circuits, it has specifically agreed that:

> "Rule 32(c) *requires sentencing judges to exercise discretion* in granting or denying requests for inspection, and we reiterate that a report should be withheld only when there are sound reasons for preserving secrecy." *United States* v. *Powell*, 487 F.2d 325, 329 (4 Cir. 1973). (Emphasis added.)

There the sentence was vacated and remanded for resentencing on other grounds, but the court made very clear its position on the issue at hand.

Thus the Seventh Circuit's decision in the instant case is in direct conflict with holdings of the Second and District of Columbia Circuits, and conflicts with dicta from the Fourth Circuit. Certiorari should be granted to resolve this conflict amongst the Circuit Courts of Appeals concerning the interpretation of a Federal Rule of Criminal Procedure.

It should also be noted that the presentence report relied on by the district judge in this case was not scrutinized by the Court of Appeals. This factor distinguishes this case from those cases where, upon a complaint of prejudice due to non-disclosure, the appeals court itself reviews the report and concludes that there was no detrimental material relied on by the sentencing court which the defendant could have countered. Even in such cases the courts stress the advisability of disclosure, and emphasize the need for the exercise of *individualized* discretion. For example, in *United States* v. *Carden,* 428 F.2d 1116 (8 Cir. 1970), the court characterized Rule 32(c)(2) as:

> "a rule which reposes *confidence in the deliberate judgment of the district court* in conducting the sentencing procedure. Cf. Good v. United States, 410 F.2d 1217 (5 Cir. 1969). Full disclosure of the presentence report in many instances could in fact violate confidential sources and possibly jeopardize rehabilitation of a defendant.... *These factors must be carefully weighed by a district judge* under Rule 32(c)." *Id.* at 1117. (Emphasis added.)

And in *United States* v. *Knupp,* 448 F.2d 412 (4 Cir. 1971):

> "This Court *has reviewed the report* but can find no detrimental material to which objection might have been made. There were no confidential disclosures or

> rehabilitative plans for which there could be a need of secrecy. There was, in fact, nothing in the report which need not have been freely disclosed to both appellant and his counsel. In such circumstances, disclosure, when requested, should be favored in order that the appearance of justice will be fostered with a resulting increase in respect for the administration of the law." *Id.* at 413. (Emphasis added.)

Concerning the need for the exercise of individualized discretion on the facts of each particular case, and on the folly of the assumption that disclosure is always detrimental, Judge Winter, concurring in *Baker* v. *United States*, 388 F.2d 931, 935 (4 Cir. 1968), stated:

> "Legal literature is replete with a debate over the pros and cons of disclosure and non-disclosure, but we need look no further than the District to Maryland in determining how district judges should be guided. In the District of Maryland, disclosure of presentence reports, in accordance with my views, has been the practice for over ten years. The experience of Maryland belies the fears that, as general propositions, sources of confidential information dry up, probation officers are deprived of trustworthy and logical informants, and the object of the report is defeated if the contents of reports are disclosed. Of course, these dangers may be present in a *particular* case if full disclosure is made, but the decision to disclose or withhold ought to be made in that case *on the basis of the facts peculiar to it* and not on the basis of general propositions which may have no valid application on the particular context." (Emphasis in original.)

Judge Winter's views concerning disclosure, followed in the District of Maryland, include full disclosure except "where there is tangible good cause to withhold exhibition of a portion of the report," *id.* at 934, and the require-

ment that the district court "make a part of the record . . . that a portion of the report has been withheld and the reason for this action," *id.* at 935.

Similarly, the First Circuit requires that "the substance of a presentence report, to the extent it is relied upon, should be made known to the defendant," *United States* v. *Picard,* 464 F.2d 215, 220 (1 Cir. 1972), and that material in the report not relied upon be identified for the record and disavowed. *Ibid.* The court further outlines possible methods for excising and summarizing portions of the report where necessary, and provides further guidelines for district courts when faced with discretionary decisions under Rule 32(c)(2). See also *United States* v. *Janiec,* 464 F.2d 126 (3 Cir. 1972), especially concurring opinion of Judge Teitelbaum, *id.* at 132-33. The District of Columbia Circuit also requires that the exercise of discretion be of record. *United States* v. *Bryant,* 442 F.2d 775, 778 (D.C. Cir. 1972).

Cf. United States v. *Solomon,* 442 F.2d 1110, 1119-21 (7 Cir. 1970) ("Hereafter in this Circuit . . . a trial court shall not consider *in camera* a prosecutor's report about a defendant prior to sentencing or ruling on post-conviction motions unless the pertinent factual information is summarized for or disclosed to defense counsel with appropriate safeguards." *Id.* at 1121.); *United States* v. *Rosner,* 485 F.2d 1213, 1229-31 (2 Cir. 1973).

Without citation of any reference to the record,[3] the Seventh Circuit stated that defendant was not harmed in the case at bar, because "the district court disclosed the general nature of the matters in the presentence report on

[3] Petitioner respectfully suggests there is no possible record reference to support the conclusion of the Court of Appeals.

which he relied on fixing the sentence." (Sl. op. p. 3, App. p. 3) While it is true that the court disclosed the general nature of two *stated* types of information, *viz.*, history of tax delinquencies and marital infidelity, it cannot be concluded that these two types of information (to which petitioner admittedly was permitted to respond) were the *only* areas negatively reflecting upon petitioner contained in the report. It is also impossible to conclude, if other types of material *were* contained therein, that the court did not rely thereon as well.

Petitioner urges that the record fails to support these asserted "reasons" for here condoning the trial court's improper refusal to exercise, discretion, and that, in fact, the record supports petitioner's position that he was harmed by the flat non-disclosure in the case at bar.[4]

The court's comments during the initial sentencing hearing (Vol. 6, pp. 42-45; see Def. Br. pp. 10-11) clearly demonstrate that the court did not see fit to disclose, even in general substance, any unfavorable material contained therein, with the exception of an allusion to defendant's marital infidelity, which was later the subject of deefnse testimony explaining same and indicating its fleeting character during the hearing on the subsequent motion to reconsider sentence. (Vol. 8, pp. 28-31 & 63-64; G. Br. p. 9) And although petitioner was made aware of the court's cognizance of his prior history of tax delinquencies, (albeit none of a criminal nature) and was given opportunity to explain to some extent his business problems which gave

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[4] Petitioner does not concede that he must show actual harm; rather he takes the position that flat non-disclosure plus reliance by the court entitles him to resentencing under the applicable authorities.

rise to these late payments in the past of taxes which he was required to collect, the court's comments (pp. 8-9, *supra*) leave open the very real possibility that *additional* adverse material contained in the report and relied upon by the court may have contributed to the maximum sentence imposed, although petitioner thus had no opportunity to rebut *any* of said unspecified detrimental information. (See court's comments set forth at pp. 6-7, 8-9, *supra.*)

The court of appeals notes that evidence of record concerning petitioner's past tax delinquencies justified imposition of the maximum sentence without regard to whatever else may have been contained in the report. (App. p. 4). This disregards the real possibility that petitioner may have been harmed by the court's reliance on erroneous material in the report which could not be refuted because it remained undisclosed. *United States* v. *Janiec,* 464 F.2d 126 (3 Cir. 1972); *United States* v. *Espinoza,* 481 F.2d 553 (5 Cir. 1973); *United States* v. *Picard,* 464 F.2d 215 (1 Cir. 1972); *Baker* v. *United States,* 388 F.2d 931 (4 Cir. 1968). While the information, possibly erroneous, possibly relied on by the court, and possibly contributing to the sentence in the case at bar may not have been the type which was the subject matter of all these decisions, their language and logic point up the constant possibility of misinformation wending its way into presentence reports and the very real danger to a defendant's right to liberty if erroneous information, unrefutable because unrevealed, is relied upon by the sentencing judge.

The presumption indulged in by the Seventh Circuit in the instant case—that petitioner in fact had adequate opportunity to rebut any incorrect material in the report —amounts to peering into a crystal ball; for it is impos-

sible, without actually reading the report, to know whether such presumption is or is not correct. Petitioner's conviction ought not be affirmed on the basis of such a presumption, unsupportable by anything in the record.

Finally, it cannot be overemphasized that, regardless of the court's having given petitioner opportunity to present certain mitigating evidence, the court's flat refusal to disclose the contents of the report, based on a blanket policy of non-disclosure rather than upon the exercise of considered discretion on a case by case basis, must not be condoned. (See pp. 10-15, *supra.*)

The reviewing courts are quick to intervene on an appellant's behalf where it is obvious that the sentencing judge relied on improper factors in making his sentencing decision, particularly where the impropriety involves refusal to exercise discretion. Although a sentence within the statutory limits ordinarily will not be overturned on review in light of the great sentencing discretion possessed by the district court, still, where that discretion is abused by refusal to exercise it, the courts of appeals act in defendants' favor. See, *e.g., United States* v. *Wiley,* 267 F.2d 453 (7 Cir. 1959) (policy that probation would never be granted to defendants who exercise their right to trial); *United States* v. *Daniels,* 446 F.2d 967 (6 Cir. 1971) (maximum sentence imposed on all draft law violators); *United States* v. *Hartford,* 489 F.2d 652 (5 Cir. 1974) (maximum sentence imposed solely because of nature of offense, a narcotics violation); *Briscoe* v. *United States,* 391 F.2d 984 (D.C. Cir. 1968) (sentencing court refused to consider possibility of deportation of alien defendant as alternative to imprisonment); *Woosley* v. *United States,* 478 F.2d 139 (8 Cir. 1973) (sentencing judge followed blanket policy to impose maximum sentence on draft evaders).

In *Woosley, supra,* the Eighth Circuit, *en banc,* held:

> "We agree with the reasoning of the *Daniels* case and its progeny. The rule against review of sentences is founded primarily upon the premise that a trial judge, who has the best opportunity to observe the defendant and evaluate his character, will exercise discretion in imposing sentence. . . . On that assumption we ordinarily defer to the trial court's judgment. However where as here, the district court has not exercised discretion in imposing sentence, there is no reason for us to defer to the trial court's judgment. In reviewing such a sentence, we would not be usurping the discretion vested in trial judges; rather we would be according the defendant the judicial discretion to which he is entitled." *Id.* at 144-45.

The court in *Hartford, supra,* stated:

> "These remarks . . . reflect a rigid sentencing policy based solely on the crime with which the defendant is charged. Such a policy is under no reasonable conception an exercise of judicial discretion. . . . [A] mechanical sentencing formula [is] an abdication of judicial responsibility." 489 F.2d at 655.

And the *Briscoe* court:

> "This refusal to exercise discretion was impermissible, and requires that we remand for reconsideration of the sentence." 391 F.2d at 986.

Because the trial court abused its discretion in flatly refusing to permit the defense to see the presentence investigation report, while at the same time relying on factual information therein contained adverse to defendant, which information defendant had no opportunity to rebut, this Court should grant certiorari, vacate the sentence and re-

mand for resentencing, preferably, under the circumstances, to a different judge. *United States* v. *Brown,* 470 F.2d 285, 289 (2 Cir. 1972); *Mawson* v. *United States,* 463 F.2d 29, 31 (1 Cir. 1972); *United States* v. *Rosner,* 485 F.2d 1213, 1231 (2 Cir. 1973); *United States* v. *Picard,* 464 F.2d 215, 220 (1 Cir. 1972).

Conclusion

For the reasons above set forth, a write of certiorari should issue to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JULIUS LUCIUS ECHELES
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Attorneys for Petitioner

APPENDIX

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 73-1780

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

SIMON GORDEN,

Defendant-Appellant.

HEARD FEBRUARY 11, 1974—DECIDED APRIL 17, 1974

Before SWYGERT, *Chief Judge,* KILEY, *Senior Circuit Judge,* and CUMMINGS, *Circuit Judge.*

CUMMINGS, *Circuit Judge.* Defendant pleaded guilty to a criminal information for failing, after notice, to deposit in a special bank account in trust for the Government certain taxes of his employees which he withheld from their pay.[1] This was in violation of 26 U.S.C. §7215.[2] A

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[1] Under Section 7501 of the Internal Revenue Code, the amount of the withheld income and social security taxes deducted from defendant's employees' wages is to be a special fund in trust for the United States. See *In Re Halo Metal Products, Inc.,* 419 F.2d 1068 (7th Cir. 1969).

[2] 26 U.S.C. § 7215 provides:

"(a) *Penalty.* Any person who fails to comply with any provision of section 7512(b) shall, in addition to any other penalties provided by law, be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $5,000, or im-

one-year sentence was imposed. A motion to reduce the sentence was later denied.

On appeal defendant first contends that his guilty plea was without sufficient factual basis. Although the September 29, 1972, notice served upon him pursuant to 26 U.S.C. §7512 plainly required him to deposit the withheld taxes within two banking days after the taxes were withheld (October 9), he claimed below that oral statements by the agent who served the notice gave him the impression that he was not expected to deposit the taxes until October 16th. Despite this assertion at the sentencing hearing, he told the trial court that he had committed the offense according to the notice and persisted in pleading guilty with the concurrence of his retained counsel. It has been held that defendant's state of mind does not provide a defense to the Section 7215 misdemeanor charge (*United States* v. *Plotkin*, 233 F. Supp. 317, 318 (E.D. Wis. 1964)), so that his plea of guilty had an adequate factual basis as required by Rule 11 of the Federal Rules of Criminal Procedure.

(Footnote continued)

prisoned not more than one year, or both, together with the costs of prosecution.

"(b) *Exceptions.* This section shall not apply—

"(1) to any person, if such person shows that there was reasonable doubt as to (A) whether the law required collection of tax, or (B) who was required by law to collect tax, and

"(2) to any person, if such person shows that the failure to comply with the provision of section 7512(b) was due to circumstances beyond his control.

For purposes of paragraph (2), a lack of funds existing immediately after the payment of wages (whether or not created by the payment of such wages) shall not be considered to be circumstances beyond the control of a person."

It is immaterial that the statutory scheme does not require willfulness, for taxpayers are protected by the following safeguards: notice must be hand-delivered before a subsequent failure to comply renders one guilty of the misdemeanor. Section 7512(a)(2). Guilt does not attach if the taxpayer can show there was reasonable doubt whether the law required collection of the tax or who was required by law to collect the tax. Section 7215(b)(1). The statute also does not apply to a taxpayer showing failure to comply was due to circumstances beyond his control. Section 7215(b)(2). Willfulness is required under the related felony section of the Internal Revenue Code (§ 7202) and under the civil penalty section (§ 6672). See *Monday* v. *United States,* 421 F.2d 1210, 1215 (7th Cir. 1970), certiorari denied, 400 U.S. 821.

Defendant next assails the district judge's refusal to make his presentence report available. However, the district court disclosed the general nature of the matters in the presentence report on which he relied in fixing the sentence. These were the defendant's long history of trust fund tax delinquencies and his marital infidelity. This was sufficient disclosure under *United States* v. *Miller,* ..... F. 2d ....., (7th Cir. # 73-1866, 1974 slip op. at 5). The matters relied on were permissible considerations. 18 U.S.C. § 3577; see also *Williams* v. *New York,* 337 U.S. 241, 247, 250; *United States* v. *Onesti,* 411 F.2d 783, 784 (7th Cir. 1969).[3] Defendant was afforded adequate opportunity

[3] Although it is a permissible consideration, we cannor attach much significance here to marital infidelity. The judge's comments at the hearing on the motion to reduce the sentence suggests that this was a much less important consideration than defendant's prior tax delinquencies.

to rebut these factors that determined his sentence. Furthermore, the district judge subsequently granted defendant a day's hearing to enable him to persuade the court that it was misinformed concerning his tax history and family life. Since the district judge explained at the hearing on the motion to reduce the sentence that it was based mainly on defendant's chronic abuse of trust fund tax obligations and the necessity of deterring others from similar practices, the sentence was not improperly based.

Defendant also contends that his sentence of imprisonment is contrary to the Fifth Amendment because he was unable to pay the taxes and therefore is being imprisoned for debt. This argument was recently rejected in *United States* v. *Patterson,* 465 F.2d 360, 361 (9th Cir. 1972), certiorari denied, 409 U.S. 1038. The court there stated:

> "The argument that he is being imprisoned for debt is specious. Patterson's misdemeanor was using as his own the tax money he was required by law to withhold from his workmen's wages and to pay over to the government. Congress had adequate power to punish such conduct."

To avoid criminal penalties defendant had the choice of going out of business or borrowing the necessary funds to pay his employees' wages and deposit the withholding taxes, or paying withholding taxes instead of paying other creditors.

We are not persuaded by defendant's other arguments. Therefore, the judgment is affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1735

SIMON GORDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole question raised by the petition is whether, under the facts and circumstances of this case, the district court's refusal to make available a presentence report to petitioner constituted an abuse of discretion.

1. Petitioner was convicted in the United States District Court for the Southern District of Illinois after pleading guilty to failing, after notice, to deposit withholding taxes in a special bank account in trust for the government employee, in violation of 26 U.S.C. 7215 (Pet. App. 1). On May 18, 1973, the district court denied petitioner's motion for disclosure of the presentence report and, after hearing testimony, denied petitioner's motion for probation. On that same date, the court sentenced petitioner to imprisonment for one year (Pet. 4; May 18 Tr. 45).[1]

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[1] "Tr." references are to portions of the transcript of proceedings in the district court held on May 18 and June 22, 1973.

After the hearing on the motions for disclosure and for probation, the court stated: "I've refused since I've been a judge to make these reports available" (Pet. 7; May 18 Tr. 45). However, the district court orally disclosed at the hearing the general nature of the matters in the presentence report that it believed justified the sentence (Pet. App. 3). It specifically referred to the aggravated nature of petitioner's long history of delinquencies in paying trust fund taxes and the fact that the report showed that he was not a good family man (Pet. 6; Pet. App. 3; May 18 Tr. 42-43). After allowing petitioner an opportunity to give any reason for a "lesser penalty" and offering to "listen to anything you say" (May 18 Tr. 43, 44), the court imposed a sentence of one year.

Prior to the execution of the sentence, petitioner filed a motion to reconsider the sentence and grant probation (Pet. 7). The district court thereupon held a full hearing in which it was revealed that petitioner (1) had given bad checks to his employees (June 22 Tr. 16-20), (2) was currently delinquent in payment to a union of fringe benefits to which the union members were entitled (June 22 Tr. 16-20), (3) owed the government about $18,000 in employment taxes (June 22 Tr. 68, 139), (4) admitted being chronically delinquent in paying trust fund taxes (June 22 Tr. 33-34), (5) averaged three delinquent employment tax accounts per year of the four that were due (June 22 Tr. 102-103), (6) had had tax liens filed against him on 22 occasions since 1961 (June 22 Tr. 103-105). The evidence further showed that notice of levy to collect taxes had to be served on third parties about twice a year (June 22 Tr. 106-107), and even after petitioner's arrest and release on bond for failure to deposit employment taxes in October 1972, he failed to deposit such taxes again only two weeks later (June 22 Tr. 53-59).

After hearing all the evidence concerning petitioner's long history of delinquencies in handling trust fund taxes, the district court concluded that the sentence should stand (Pet. App. 3; June 22 Tr. 137-139, 142-145, 149, 151-154, 166). The court of appeals affirmed (Pet. App. 1-4).

2. Petitioner contends (Pet. 8, 10-11) that the district court's refusal to allow him to see the presentence report, upon which it relied in imposing sentence, was an abuse of discretion. Rule 32(c) of the Federal Rules of Criminal Procedure (Pet. 2-3) provides that a court may disclose all or part of the material contained within the report of the presentence investigation. This rule does not make the report available to a defendant as a matter of right. To the contrary, the rule is permissive and allows the court to use its discretion in determining whether to reveal any part of the report. *Baker* v. *United States*, 388 F. 2d 931 (C.A. 4); *United States* v. *Humphreys*, 457 F. 2d 242 (C.A. 7).[2]

In this case, the record demonstrates beyond question that the district court essentially revealed the elements in the presentence report that were influential in the imposition of sentence. As the court of appeals noted, while the district court refused to make the complete report available, it did orally disclose "the general nature of the matters in the presentence report on which he relied in fixing the sentence." Moreover, the record reveals that before sentencing petitioner, the district court afforded him an opportunity to rebut the factors it relied upon in fixing the sentence (Pet. App. 3-4). Moreover, prior to the execution of sentence, the district court permitted petitioner, in a subsequent hearing on his motion to reduce sentence, the opportunity to answer, explain or show the court that it was misinformed concerning the factor it mainly relied upon

in originally sentencing him, *viz.*, his "chronic abuse of trust fund tax obligations" (Pet. App. 4). The hearing simply confirmed the aggravated nature of petitioner's disregard for the handling of trust fund taxes (June 22 Tr. 33-34, 53-59, 68, 102-107, 139). Since petitioner was fully informed of the reasons for the sentence and was afforded a fair and full opportunity to answer, explain, or rebut the factors relied upon by the court in fixing his sentence, the district court did not abuse its discretion under Rule 32(c) in refusing to disclose the entire presentence report. *United States* v. *Carden*, 428 F. 2d 1116 (C.A. 8); *United States* v. *Humphreys, supra.*[2]

3. Contrary to petitioner's contention (Pet. 11-14), the decision below does not conflict with either *United States* v. *Bryant*, 442 F. 2d 775 (C.A. D.C.); or *United States* v. *Brown*, 470 F. 2d 285 (C.A. 2). Both of those cases held that the question of disclosure of the presentence report is within the discretion of the trial court. In holding that the district court abused its discretion, the District of Columbia Circuit in *Bryant* emphasized the length of the defendant's sentence (18 to 54 years) coupled with his lack of a prior criminal record. Under these circumstances, the court concluded that the district court was obligated to make known what, if anything, in the report formed the basis of the sentence. Similarly, the Second Circuit held in *Brown* that there was an abuse of discretion in the sentencing of the defendant where

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[2] Disclosure of the presentence report is not constitutionally required. In *United States* v. *Picard*, 464 F. 2d 215, 220 (C.A. 1), the court held only that the substance of a presentence report, to the extent relied upon by the trial judge, must be made known to the defendant. In *United States* v. *Janiec*, 464 F. 2d 126 (C.A. 3), the court held that where the defendant or his counsel requests disclosure of the list of prior convictions, the trial judge is required to do so or disclaim any reliance on it.

the court imposed a three-year sentence on a defendant who had no prior criminal record, without any comment or explanation for the sentence other than that it was "appropriate." Like *Bryant*, nondisclosure of the presentence report was held to be an abuse of discretion because it did not afford the defendant an adequate opportunity to comment, answer or explain any facts relied upon by the court in imposing sentence. Here, on the other hand, the district court orally disclosed the general nature of the matters in the presentence report upon which it relied in imposing sentence and afforded petitioner an adequate opportunity to rebut the matters relied upon by the district court in determining the sentence (Pet. App. 3-4).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

DOJ-1974-09